No. 13,327

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFRED DUSSELDORF,
Appellant,

vs.

HARLEY O. TEETS, Warden, California State Prison at San Quentin, California,
Appellee.

BRIEF FOR APPELLEE.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
CHARLES E. McCLUNG,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellee.

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STATEMENT OF THE CASE.

On March 5, 1952, Alfred Dusseldorf filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division (R 1).

Judge Goodman denied the writ (R 14).

The next day Judge Goodman denied Dusseldorf's application for a certificate of probable cause (R 16).

On March 7, Dusseldorf sought and was granted a certificate of probable cause by Chief Judge William Denman of this Court (R 17). This is the appeal from the denial of the writ.

STATEMENT OF THE FACTS.

Alfred Dusseldorf was convicted of murder in the first degree and sentenced to death by the Superior Court of the State of California, County of Alameda.

His conviction was appealed to the Supreme Court of California. The conviction was affirmed by the California Supreme Court. The opinion appears at 37 Cal. 2d 801.

The details of the crime appear in that opinion.

> "* * * On October 14, 1949, at about 1:30 in the afternoon, George Gaertner was found lying on the floor, mortally wounded in Bloomheart's Tavern on San Pablo Avenue in Emeryville, where he was employed as a bartender. Irvin Condre, working at the time at a service station across the street from Bloomheart's, heard the firing of some shots. As he looked in the direction of the noise, he saw three colored men, wearing Army fatigue uniforms, leave the tavern, walk to the corner, and then break into a run to a car double-parked on a side street. They drove away before he could note the license number. Condre then entered the tavern, where he found no one except the bartender outstretched on the floor, moaning and in a semiconscious state, with blood on the front of his shirt. Without regaining consciousness, Gaertner died early the next morning. His death resulted from the hemorrhage of both lungs and the heart in consequence of gunshot wounds.
>
> The police arrived at the tavern within a few minutes after Condre. Upon making a search of the premises, the police found no gun but they

did discover two bullets, one embedded in a post and the other lying on the seat of a booth, where it had apparently ricocheted. Some three months later a gun was found by some workmen in the course of doing some excavating work in De-Fremery Park in Oakland. Both the gun and the bullets were introduced in evidence at the trial; and a ballistics expert testified that these two bullets had been fired from that gun.

Miller was first apprehended and taken into custody on November 8, 1950, more than a year after the commission of the crime. He was questioned by the Chief of Police of Emeryville, and he signed a written statement, made about 1 p.m., wherein he admitted that he had participated 'about one year ago' in the 'Bloomheart stickup'. He stated that one evening when he, Dusseldorf, and another colored man met in San Francisco, Dusseldorf said that he knew 'where to make some money, not stating where'; that the next day the three of them drove across the bridge to Bloomheart's Cafe on San Pablo Avenue; that upon entering the tavern, they found no one there except the bartender; that he, Miller, heard one of the two men with him say 'This is a holdup'; that Dusseldorf was carrying a revolver; that he, Miller, heard two shots fired, and that he and his two companions then fled from the tavern.

Later that same afternoon Miller made a similar, though more detailed statement to an assistant district attorney about the 'robbery and shooting', saying that he was 'willing to tell what happened' there. Again Miller recounted the preliminary meeting of himself and his two confederates to plan a 'job' to make some money;

their trip the next day from San Francisco across the bridge to Bloomheart's Tavern on San Pablo Avenue; their entry into the tavern, with Dusseldorf being the only one carrying a gun; the remark of one of the men, as they walked by the counter, that 'This is a holdup,' and immediately thereafter his hearing a shot; his running toward the door as he heard a second shot fired; and then the escape of all three in the car which had been left double-parked on the street. Miller stated that his part in the 'job' was to act as a 'lookout', stationed near the door. Both of these statements were admitted in evidence only as against Miller.

On the evening of November 8, 1950, and following Miller's account of Dusseldorf's involvement in the Bloomheart 'job', Dusseldorf, who had also been taken into custody that day, gave his statement to the same assistant district attorney. While admitting his participation as one of the trio in the planned robbery of the tavern, Dusseldorf transposed the roles that he and Miller played at the scene of the homicide, Dusseldorf maintaining that he did not enter the place but stood at the door and that it was Miller who fired the shots just after their companion had said 'This is a holdup'. Dusseldorf further stated that they had used his car, a grey Chrysler, to make the trip; that after the shooting, he drove all three to the home of a friend, where they changed their clothes, and that he, Dusseldorf, threw the ones which they had been wearing into a garbage can; that at that time he hid the gun in his friend's house but retrieved it some two weeks later, when he finally disposed of it by throwing it into a

'bunch of cement blocks' near where a swimming pool was under construction in DeFremery Park in Oakland. This statement was admitted in evidence only against Dusseldorf.

Condre, the service station attendant who went to Bloomheart's Tavern immediately after the shooting, positively identified Miller and Dusseldorf both at the trial and on the occasion of the preliminary examination a month after their arrest. He also testified that they were wearing 'Army fatigue clothes' as he saw them leave the tavern. There was testimony that on the afternoon in question 'a colored fellow' was seen putting a 'pair of coveralls in the garbage can' on the premises where, according to Dusseldorf's statement, he and his two companions had gone to change their clothes; and that later that day the coveralls were recovered from the garbage can and turned over to the police. These coveralls were introduced in evidence and identified by Condre as similar in appearance to those worn by the three men as they left the tavern. Condre also described the 'getaway' car as blackish grey in color.

Neither Miller nor Dusseldorf testified at the trial. Their separate extra-judicial statements, as above detailed, agree in the main pattern of events up to a certain point—the identity of the person who allegedly did the actual shooting—with Miller and Dusseldorf each claiming that the other was the one who fired the gun."

People v. Miller, 37 Cal. 2d 801, at 803-805.

In his petition for habeas corpus the appellant contends that he was not represented by counsel of his

choice and that he was ineffectively represented by counsel.

These are the facts asserted in the petition.

While the petitioner was incarcerated awaiting trial he met another inmate whose attorney was W. D. Belcher.

The inmate suggested that inasmuch as Dusseldorf wanted to get in touch with his mother perhaps Mr. Belcher could convey the message (R 7).

Mr. Belcher visited Dusseldorf and told him he would go to his mother with the message (R 7). Dusseldorf told Mr. Belcher that he did not want to hire any attorney until he talked with his mother. Dusseldorf did not want Belcher to represent him because he thought he lacked the skill necessary to defend this robbery-murder charge (R 7).

The petition then alleges that Mr. Belcher went to petitioner's mother and told her that petitioner wanted to retain him as his attorney.

After thus securing the mother's approval Belcher went back to the jail and told petitioner that the mother wanted him to be retained as counsel (R 8).

The petitioner reluctantly accepted him. Mr. Belcher assured the petitioner that if he conducted the defense the petitioner would get a light sentence or an acquittal and under no circumstances death. Mr. Belcher said he would investigate and have a strong defense ready (R 8).

Subsequently the petitioner conferred with Belcher and attempted to find out what Belcher was doing to prepare a defense. Belcher assured him everything was going well but would divulge no details (R 8).

On the day of the trial petitioner forced Belcher to admit that he had not prepared a defense (R 8).

The petitioner informed the trial Court that he did not think Belcher was prepared and that he desired a continuance to secure another attorney (R. 9). The Court denied the request.

The judge informed petitioner that he could discharge Belcher if he wished but that the trial would go ahead. The judge advised the petitioner that he should retain Belcher rather than going ahead by himself or hiring an attorney unfamiliar with the case (R 9).

The case went to trial and, the petitioner asserts, his fears concerning the ability of his counsel proved well founded. Mr. Belcher did not call any witnesses; he did not put the petitioner on the stand (Belcher said he would make it bad for petitioner if he took the stand); he did not attack the falsity of the confession admitted into evidence against the petitioner; he did not attempt to prove any defense (R 9).

On these facts the petitioner concludes he was deprived of due process of law in the proceedings which resulted in his conviction.

On these facts the District Court refused to issue the writ and the case is here on appeal.

SUMMARY OF APPELLANT'S CONTENTIONS.

I. The appellant was denied counsel of his own choosing in violation of the 14th Amendment to the Constitution of the United States.

II. The appellant was ineffectively represented by counsel in violation of the 14th Amendment to the Constitution of the United States.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The appellant has not exhausted his State remedies as required by Title 28 U.S.C. Sec. 2254 because his contentions could and should have been presented to the Supreme Court of California on the appeal from his conviction.

A. Dusseldorf *could* have presented his contentions to the Supreme Court of California on the appeal of his conviction.

B. Dusseldorf *should* have presented his contentions to the Supreme Court of California on the appeal of his conviction.

II. Because the petition does not allege facts which, if true, would entitle the appellant to relief the District Court properly dismissed the petition.

A. The facts alleged in the petition are insufficient as a matter of law to show that the California trial Court denied Dusseldorf counsel of his choosing.

B. The facts alleged in the petition are insufficient as a matter of law to show that the trial court denied Dusseldorf the right to effective representation of counsel.

ARGUMENT.

I. THE APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES AS REQUIRED BY TITLE 28 U.S.C., SECTION 2254, BECAUSE HIS CONTENTIONS COULD AND SHOULD HAVE BEEN PRESENTED TO THE SUPREME COURT OF CALIFORNIA ON THE APPEAL OF HIS CONVICTION.

The asserted lack of due process upon which the petition in this case is based is two-fold. First, it is claimed that the trial Court denied the appellant his constitutional right to be represented by counsel of his choice and, second, it is claimed that counsel who represented the petitioner was so incompetent and inefficient that the representation amounted to a nullity and there was therefore in practical effect a denial of the appellant's constitutional right to be represented by counsel.

In this portion of our argument we put aside the merits of these contentions.

It is our position that the State of California provided the appellant with adequate post-conviction corrective process by way of appeal from the judgment; that there was no barrier either legal or otherwise to the availability of this corrective process to the petitioner; and that because he failed to invoke this

corrective process the appellant cannot now raise these questions in a habeas corpus proceeding.

In *Jennings v. Illinois,* 72 S. Ct. 123 (1951) the Court said:

> "Petitioners claim that they are held in custody in violation of the federal constitution in that coerced confessions were used to obtain their convictions. Where, as here, a federal claim can be raised at the trial, it may be forfeited by failure to make timely assertion of the claim. And, if a state provides a post-conviction corrective process, that process must be invoked and relief denied before a claim of denial of substantial federal rights may be entertained by a federal court." (p. 126.)

By failing without excuse to exhaust the corrective process by way of appeal provided by the state of California Dusseldorf has failed to exhaust his state remedies as required by title 28 U.S.C. Sec. 2254.

Title 28 *U.S.C.* Sec. 2254 provides:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state * * *"

In the revisor's note to the section it is stated:

> "This new section is declaratory of existing law as affirmed by the Supreme Court. See *Ex parte Hawk* (1944), 64 S. Ct. 448, 321 U.S. 119, 88 L. Ed. 572."

Ex parte Hawk, supra, stated the rule thus:

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, *including all appellate remedies in the state courts* and in this court by appeal or writ of certiorari have been exhausted." 321 U.S. 114, 116 (emphasis supplied).

A. Dusseldorf could have presented his contentions to the Supreme Court of California on the appeal of his conviction.

The appellant asserts that he was deprived of his right to counsel of his choosing. He bases the assertion on a colloquy with the trial judge in chambers before the trial at which time he informed the trial judge that he did not want his present counsel to continue in the case. All this is a matter of record. Deprivation of counsel of one's choice in this manner can be and is in the normal case argued on appeal. *Calif. Const.,* Art. I, sec. 13; *People v. Gay,* 37 Cal. App. (2d) 246 [99 Pac. (2d) 371]; *People v. Pearson,* 41 Cal. App. (2d) 614 [107 Pac. (2d) 463]; *People v. Stroble,* 36 Cal. (2d) 615, 628 [226 Pac. (2d) 330]; *People v. Manchetti,* 29 Cal. (2d) 452, 456 [175 Pac. (2d) 533].

It can be argued on appeal in the Federal Courts. *United States v. Gutterman* (2d Cir. 1945), 147 Fed. (2d) 540; *United States v. Mitchell* (2d Cir. 1943), 137 Fed. (2d) 1006, affirmed on rehearing 138 Fed. (2d) 831, certiorari denied 321 U.S. 794.

Similarly the appellant's claim that he has been denied effective assistance of counsel could have been

urged on appeal in California. Again this lack of counsel or representation by counsel so inadequate as to amount to no counsel at all (*Powell v. Alabama,* 287 U.S. 45) are not matters dehors the record. Lack of counsel would be apparent to the most casual observer thumbing through the record. Lack of effective assistance of counsel (if it is such to make the trial a sham and a mockery of justice. *Powell v. Alabama,* supra, 287 U.S. 45; *Diggs v. Welch* (D.C. 1945) 148 Fed. (2d) 667) would certainly be apparent to the seven justices of the California Supreme Court who scrupulously examine the record in these death penalty cases in California.

In short, the claim can be raised on appeal in California. *People v. Chesser,* 29 Cal. (2d) 815 [178 Pac. (2d) 761] (judgment reversed for ineffective assistance of counsel relying on *Powell v. Alabama,* 287 U.S. 45) cf. *People v. Ballentine,* 39 A.C. 199.

In the Federal Courts lack of effective assistance of counsel can be argued on appeal. *Seadlund v. United States* (7th Cir. 1938), 97 Fed. (2d) 742; *Paschen v. United States* (7th Cir. 1934), 70 Fed. (2d) 491, 495.

B. Dusseldorf should have presented his contentions to the Supreme Court of California on the appeal of his conviction.

In the Federal Courts the writ of habeas corpus cannot be used to perform the function of an appeal. *Goto v. Lane,* 265 U.S. 393, 402; *Riddle v. Dyche,* 262 U.S. 333; *Craig v. Hecht,* 263 U.S. 255, 277; *Sunal v. Large,* 332 U.S. 174.

The same rule applies in California. *In re McInturff,* 37 Cal. (2d) 876 [236 Pac. (2d) 574]; *In re Conner,* 16 Cal. (2d) 701, 108 Pac. (2d) 10.

Indeed it is more than probable that this was the ground upon which Dusseldorf's petition to the Supreme Court of California was denied. Dusseldorf was represented at the trial by Mr. Belcher. On appeal the Supreme Court appointed Joseph R. Rankin to handle Dusseldorf's case. The Supreme Court affirmed the conviction in November. Shortly thereafter a petition for habeas corpus was filed presenting questions which were at all times within the knowledge of the petitioner, which appeared on the face of the record and which were not even hinted at on the appeal. It is not at all startling that the Supreme Court denied the petition without issuing the writ.

That a state may validly apply such a rule is apparent. As well stated by Mr. Justice Frankfurter in the dissent to *Jennings v. Illinois,* 72 S. Ct. 123, 128:

> "What is a substantial federal question? Certainly whether a claim which could have been raised by the method of direct review of the trial proceedings but was not, must be allowed to be raised in some collateral attack, is not a substantial question. Such a requirement cannot be made of the States under the Fourteenth Amendment. It is not enforceable even as to federal prosecutions. Sunal v. Large, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982."

The California rule is substantially the same as the federal rule. As the California Supreme Court stated in *In re Wallace,* 24 Cal. (2d) 933:

> "A violation of the defendant's constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a habeas corpus proceeding if the petitioner has no other adequate remedy to test the constitutionality of the proceeding resulting in his conviction. [Citing cases.] Petitioner could not appeal from his conviction on the ground on which he now relies, for he obtained the information underlying his petition only after Wehr's death in 1939, when the time for appeal had expired."

The Court then considered the petitioner's claim that the prosecution had knowingly employed perjured testimony to secure his conviction on the merits. cf. The federal rule as analyzed by the United States Supreme Court in *Sunal v. Large* (1946), 332 U.S. 174 178, 179.

The crucial question therefore when determining whether an accused *should* resort to an appeal or be foreclosed from a later collateral attack is whether an appeal was available as a practical matter. See *Johnson v. Zerbst* (1937), 304 U.S. 458, 467.

If a defendant is denied counsel at the trial that denial may be the very reason he cannot appeal, *Johnson v. Zerbst,* supra, 304 U.S. 458, or if the defendant is represented by ineffective counsel at the trial and the same counsel takes the appeal ineffective assistance of counsel will probably not be urged.

But the facts in Dusseldorf's case are not even similar to these. In Dusseldorf's case a new attorney was appointed by the Supreme Court of California, the facts relied on were not dehors the record. The only conceivable reason for not raising the question is that it was deemed unmeritorious and not important.

In *Moore v. Shuttleworth* (6th Cir. 1950), 180 Fed. (2d) 889, 890 the petitioner urged lack of effective representation of counsel. The Court held that:

> "This was a matter which if deemed important, should have been addressed to the consideration of the district court and was no doubt reviewable on appeal but it could not be made the subject of a collateral attack on habeas corpus."

There is no substantial distinction between the case at bar and the case of *Canizio v. New York* (1945), 327 U.S. 82.

In the *Canizio* case the petitioner pleaded guilty in a New York Court without the assistance of counsel and without notice of the charge against him. Accepting this plea was reversible error and a denial of the right to counsel guaranteed by the 14th Amendment. *Hawk v. Olsen,* 326 U.S. 271. But subsequently and before sentencing, counsel was appointed for the accused. The Supreme Court held that since counsel could have moved to withdraw the guilty plea and he elected not to do so, the petitioner could not collaterally attack the unlawful guilty plea. In the opinion the Supreme Court recognized that if counsel had made such a motion to withdraw the plea it would

have had to be granted and if it were not granted the Supreme Court would have reversed. But by making this conscious election he had waived his right to question the validity of the plea.

Compare the *Canizio* case to the case at bar. Dusseldorf alleges he was denied the effective representation of counsel of his choosing at the trial. On appeal, under the guidance of a new attorney appointed by the Supreme Court he did not raise the question. He has waived his right to raise the question just as Canizio did. *Gayes v. New York* (1946), 332 U.S. 145, 148, 149; *U. S. ex rel. Rogalski v. Jackson* (2d Cir. 1944), 146 Fed. (2d) 251; *Sanderlin v. Smythe* (4th Cir. 1943), 138 Fed. (2d) 729.

Because Dusseldorf did not raise on appeal the questions he now asserts, he has failed to invoke the corrective process of the State of California and the judgment of the District Court denying his petition should be affirmed. Title 28 U.S.C., Sec. 2254.

II. BECAUSE THE PETITION DOES NOT ALLEGE FACTS WHICH, IF TRUE, WOULD ENTITLE THE APPELLANT TO RELIEF THE DISTRICT COURT PROPERLY DISMISSED THE PETITION.

A. The facts alleged in the petition are insufficient as a matter of law to show that the California Trial Court denied Dusseldorf counsel of his choosing.

The petition alleges that the petitioner was forced to trial without the assistance of counsel of his choice. This conclusion is based on the following facts.

(1) The petitioner did not want Belcher as his counsel from the beginning (R 7).

(2) He only retained Belcher through Belcher's trickery (R 7, 8).

(3) Petitioner discovered that Belcher wasn't doing anything to prepare a defense (R 8).

(4) On the day of the trial the petitioner informed the Court that he desired to discharge Belcher, that Belcher was not prepared. Petitioner asked for a continuance to secure other counsel.

(5) The trial judge informed the petitioner that he could discharge Belcher if he wished but that the trial was going to go ahead that day. The trial judge advised petitioner to keep Belcher, who was familiar with the case, rather than try to defend himself (R 9).

Do these facts, if true, make the trial a sham and the judgment void? We submit that they do not.

In the first place the method by which Mr. Belcher was retained by the appellant is entirely immaterial to this inquiry. Appellant did not call the trial Court's attention to the facts of which he now complains, but consciously elected to go ahead. He can not at a later date complain.

In *Hudspeth v. McDonald* (10th Cir. 1941), 120 Fed. (2d) 962, the petitioner was complaining that his attorney was drunk throughout the trial. The Court pointed out that the petitioner had never informed the Court that he was dissatisfied with his counsel.

> "There is a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel. It is the denial of the right to have such assistance that gives the right to challenge a judgment by writ of habeas corpus. It is held without exception that the right to have counsel may be waived and that it is only when it is not waived that the validity of the proceedings may be challenged by writ of habeas corpus."

The only remaining facts pertinent to the denial of counsel of his choice are that the petitioner told the trial judge that he did not think his counsel prepared, and he wanted a continuance to secure other counsel.

Does the judge's refusal to appoint other counsel and continue the case constitute a lack of due process? The cases cited in appellant's brief do not so hold. The two Indiana cases deal with the construction of Article I, Sec. 13 of the *Indiana Constitution*. They are not material. The Federal cases we will deal with later.

The appellant's claim in the case at bar is substantially the same as the petitioner's in *Swope v. McDonald* (9th Cir. 1949), 173 Fed. (2d) 852. The only distinction is that the petitioner in the *McDonald* case had a much stronger case.

The *McDonald* case was an appeal from an order discharging the petitioner, taken by the United States to the full bench of the Court of Appeals for this circuit sitting in bank. In that case, as in this, the petitioner alleged that he was forced to trial with

counsel not of his choosing. Essentially these were the facts.

There was bad feeling between McDonald and his attorney prior to the trial. This bad feeling arose over the attorney's failure to attempt to secure McDonald's release pending trial by writ of habeas corpus. McDonald felt so strongly about it that prior to the trail he lodged a complaint with the Bar Association.

On the opening day of the trial McDonald told his attorney that he wanted to discharge him. McDonald then informed the Court of the differences between himself and his counsel and told the judge of the complaint filed with the Bar Association. Apparently McDonald requested appointment of other counsel. But the judge said the trial would go on.

The Court of Appeals for the Ninth Circuit sitting in bank unanimously held that the trial judge was not required to halt the trial and appoint other counsel. The Court pointed out that McDonald could have represented himself if he so desired but that he did not make that request.

In the case at bar the trial judge informed Dusseldorf that he could represent himself if he wished but that the trial would go on.

In the *McDonald* case the Court said:

> "Some breach of genuine gravity in the attorney-client relationship must appear before discontinuance of the trial could be thought essential." (p. 854.)

The only breach alleged in Dusseldorf's petition is that he felt his attorney unprepared. If the Federal Court did not deny due process at law to McDonald, the State of California did not deny due process of law to Dusseldorf.

In the *McDonald* case the petitioner relied on *Glasser v. United States,* 315 U.S. 60, just as the appellant does here. The Court rejected McDonald's argument.

> "We turn finally to Glasser v. United States, supra. In that case the trial court, over objection, had appointed Glasser's attorney, Stewart, to represent also an alleged co-conspirator, who turned out to be much more deeply embroiled than Glasser. In considering the claim of prejudice resulting the court indulged in no *a priori* assumptions. It surveyed the entire record and found there persuasive evidence that the appointment of Stewart as counsel for the alleged co-conspirator had in fact embarrassed and inhibited Stewart's conduct of Glasser's defense. It pointed to numerous and critical instances in which Stewart found himself unable faithfully to serve two masters. We see no resemblance between the situation found to obtain in that case and that developed here." (p. 856).

B. The facts alleged in the petition are insufficient as a matter of law to show that the trial Court denied Dusseldorf the right to efficient representation of counsel.

The appellant alleged that his counsel was inefficient at the trial and that the appellant was thus deprived of due process of law. These are the allegations:

(1) Mr. Belcher did not call any defense witness;

(2) Mr. Belcher did not put Dusseldorf on the stand;

(3) Mr. Belcher told Dusseldorf he would make it bad for him if he took the stand;

(4) Mr. Belcher did not attack the falsity of the statement introduced into evidence against Dusseldorf.

We submit that these facts do not allege a denial of due process of law. Again we point out that what may have gone on between Dusseldorf and his attorney uncommunicated to the trial Court is immaterial to the question of whether the trial was void for lack of due process. *Hudspeth v. McDonald* (10th Cir. 1941) (120 Fed. (2d) 962); *Diggs v. Welch* (D.C. 1945), 148 Fed. (2d) 667, 670; *Dorsey v. Gill* (D.C. 1945), 148 Fed. (2d) 857, 875; *United States v. Wight* (2d Cir. 1949), 176 Fed. (2d) 376, 379.

The other facts alleged are not at all abnormal in criminal trials. The defendant's failure to take the stand is so common that it is almost the rule in criminal cases. Failure to produce defense witnesses thus relying on the presumption of innocence is also quite common. Indeed it is considered good strategy when the only available witnesses are not too strong. Failure to attack a confession put in evidence is also common. Again this is considered by some to be good strategy. To attack it only emphasizes it and in the event the attack fails the man is finished. But by

ignoring it the defense can berate it on argument in the hope that there may be cast upon it some reasonable doubt of its validity.

Significantly no complaint is made of the *voir dire,* the cross-examination of witnesses, the formulation of instructions, the arguments to the jury, or the motion for a new trial and arguments thereon.

Consider the allegations of the petition in light of the decisions.

It was early recognized that the requirement of counsel cannot be satisfied by mere formal compliance. The first recognition of this and still the leading case on the subject is *Powell v. Alabama,* 287 U. S. 45.

Mr. Justice Minton when Circuit Judge for the Seventh Circuit had occasion to discuss this case in *United States ex rel. Weber v. Ragen* (7th Cir. 1949), 176 Fed. (2d) 579, 586.

> "No case has better indicated the constitutional right of a defendant to counsel and its fulfilment than Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527. There the trial court appointed the entire bar of the county as counsel. The defendants had counsel and competent counsel, but what was everybody's responsibility became no one's responsibility and the imposing array of counsel just went through the motions of giving the defendant a trial. *That was a denial of due process because it destroyed the essential integrity of the proceedings.* Nothing in this record remotely suggests such failure of counsel." (Emphasis supplied).

Speaking again of the requirement of counsel Mr. Justice Minton in *U. S. v. Ragen* (7th Cir. 1948), 166 Fed. (2d) 976, 980, pointed out that the petitioner's counsel was an old man and that there was considerable evidence of inefficiency.

> "Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise, he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity of counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty of justice, such action might be considered on the presumption that such a trial was a denial of due process. The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate a trial unless on the whole the representation is of such low caliber as to amount to no representation and reduce the trial to a farce. A fair appraisal of the record in this case does not remotely approach such a state."

This rule expressed by Judge Minton finds universal acceptance in the cases. The representation by counsel, if it is to be of such low caliber as to amount to a lack of due process, must be such as that the trial is a farce, a sham and a mockery of justice.

Diggs v. Welch (D.C. 1945), 148 Fed. (2d) 667; *Merritt v. Hunter* (10th Cir. 1948), 170 Fed. (2d) 739; *Morton v. Welch* (4th Cir. 1947), 162 Fed. (2d) 890; *Andrews v. Robertson* (5th Cir. 1944), 95 Fed. (2d) 101; *Conley v. Cox* (8th Cir. 1943), 138 Fed. (2d) 786; *Achtien v. Dowd* (7th Cir. 1941), 117 Fed. (2d) 989; *Pierce v. Hudspeth* (10th Cir. 1942), 126 Fed. (2d) 337; *Dorsey v. Gill* (D.C. 1945), 148 Fed. (2d) 857. Some of the reasons for the rule were discussed in *Diggs v. Welch,* supra, p. 669.

> "The result of such an interpretation would be to give any Federal prisoner a hearing after his conviction in order to air his charges against the attorney who formerly represented him. It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear. * * * For these reasons we think absence of effective representation by counsel must be

> strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it. * * * They are all cases where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice." (p. 470.)

The allegations in Dusseldorf's petition certainly do not even indicate that his trial was a farce or a mockery of justice. The occurrences of which he complains are not even extraordinary but are frequent in criminal trials. The District Judge properly concluded that the petition was insufficient as a matter of law. Title 28 U.S.C., Sec. 2243. *Walker v. Johnston,* 312 U.S. 275.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the dismissal of the petition for habeas corpus be affirmed.

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EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
CHARLES E. MCCLUNG,
Deputy Attorney General of the State of California,
Attorneys for Appellee.